

MV 96-4

Tax Type: MOTOR VEHICLE USE TAX

Issue: Rolling Stock (Purchase/Sale Claimed To Be Exempt)

STATE OF ILLINOIS
DEPARTMENT OF REVENUE
OFFICE OF ADMINISTRATIVE HEARINGS
CHICAGO, ILLINOIS

THE DEPARTMENT OF REVENUE)	
OF THE STATE OF ILLINOIS)	Docket No.
)	IBT No.
v.)	NTL No.
)	
TAXPAYER)	Administrative Law Judge
)	Mary Gilhooly Japlon
Taxpayer)	

RECOMMENDATION FOR DISPOSITION

Appearances: Special Assistant Attorney General Richard A. Rohner, on behalf of the Department of Revenue of the State of Illinois; Collins & Collins, by Michael R. Collins, on behalf of TAXPAYER

SYNOPSIS:

This matter comes on for hearing pursuant to the timely protest by TAXPAYER (hereinafter "TAXPAYER" or "taxpayer") of Notice of Tax Liability ("NTL") No. XXXXX, issued by the Department of Revenue on June 17, 1994 for Use Tax, penalty and interest due on purchases of buses. The taxpayer timely protested the assessment and a hearing was held whereat WITNESS A and WITNESS B testified on behalf of the taxpayer, and Mr. Jeffrey Burgett testified on behalf of the Department. Specifically at issue is whether the taxpayer is entitled to the "rolling stock" exemption of the Use Tax Act on its bus purchases. The parties filed a joint Stipulation of Facts. Subsequent to the hearing, they filed memoranda of law in support of their respective positions.

Following the submission of all evidence and a review of the record and briefs filed herein, it is recommended that this matter be resolved in favor of the Department of Revenue.

FINDINGS OF FACT:

1. The Department's *prima facie* case, inclusive of all jurisdictional elements, was established by the admission into evidence of the Correction of Returns, showing a total liability due and owing in the amounts of \$59,236 for state Use Tax deficiencies and penalty, and RTA Use Tax deficiencies and penalty in the amount of \$2,370. (Dept. Ex. No. 1; Tr. p. 8).

2. The Notice of Tax Liability at issue is based upon the Department's disallowance of the rolling stock exemption for the subject 25 buses. (Stip. par. 11).

3. The taxable period at issue is July 1, 1990 through August 31, 1990. (Dept. Ex. No. 1; Tr. p. 7).

4. However, the period reviewed by the revenue auditor was initially extended through December 1992, and ultimately extended through June 1993 due to the fact that the taxpayer submitted trip tickets for the extended periods. (Joint Ex. No. 1, Ex. No. 4).

5. The corporate headquarters of TAXPAYER is located in Barrington, Illinois. It also has operations in the following Illinois locations: Wheeling, Palatine and Prairie View. (Stip., par. 2).

6. On June 10, 1988, the Interstate Commerce Commission issued a certificate evidencing its grant of authority to TAXPAYER to operate as a common carrier, replacing prior certificates issued to it on March 23, 1983, June 2, 1983 and December 8, 1987. (Stip., par. 3).

7. At all relevant times, TAXPAYER operated to the full extent of its approved common carrier authority. (Stip., par. 4).

8. In addition to providing transportation for children to and from school, TAXPAYER runs charter trips for school field trips, sporting events and other extracurricular activities. (Stip. par. 4; Tr. p. 9).

9. TAXPAYER also provides charter trips for hire to private groups year round. (Stip. par. 4).

10. Invoices (also referred to as "trip tickets") produced by the taxpayer identify the interstate trips for each of the subject 25 buses over a four year period. (Stip. par. 5; Ex. No. 2.).

11. Exhibit 3 to the Stipulation summarizes the number of interstate trips for each of the subject 25 buses broken down for the years 1990, 1991, 1992 and 1993. (Stip. par. 6; Ex. No. 3).

12. Regarding each of the trips identified in Exhibit Nos. 2 and 3 of the Stipulation, TAXPAYER billed its respective customer(s) for each trip. (Stip., par. 7).

13. Pursuant to a reaudit conducted on April 10, 1995, the Department determined that the 25 buses at issue traveled 5.01 percent of their miles in the four year period in interstate trips, that the buses made 389 interstate trips and that on average each bus made 15.56 interstate trips from August 22, 1990 through June 30, 1993. (Stip. par. 12; Ex. No. 4).

14. The audit originally found the total number of interstate trips involving the 25 buses at issue to be 304. The increase in interstate trips is mostly attributable to the fact that during these administrative proceedings the taxpayer provided trip tickets for the period January 1993 through June 1993. The period under review had previously been through December 1992. (Stip. par. 5; Ex. No. 4).

15. TAXPAYER advertises in the Yellow Pages that it provides interstate transportation services. (Tr. p. 10).

16. In Illinois, TAXPAYER's fleet consists of 426 vehicles, none of which are dedicated to any one particular customer. (Tr. p. 10).

17. The majority of TAXPAYER's business involves contracts with specific school districts for school transportation services. (Tr. pp. 10, 16).

18. A particular bus can be used for various purposes. (Tr. p. 11).

19. Pursuant to the stipulated facts, approximately 5 percent of the trips at issue involved interstate travel, described as crossing state lines or going to O'Hare International Airport. (Stip. par. 12; Ex. No. 4).

20. Ninety-five percent of the trips involved strictly intrastate school transportation services. (Tr. p. 15).

21. Evidence was presented indicating that of the 25 buses at issue, 12 buses made zero interstate trips during at least one of the years reviewed (1990, 1991, 1992, 1993). (Stip. par. 6; Ex. No. 3).

22. TAXPAYER bases its charges for charters upon the tariffs filed with the Interstate Commerce Commission ("ICC"). (Tr. pp. 11, 12).

23. In most cases, when the taxpayer took groups of people to the airport, it picked them up at the airport at a later date to bring them home. Occasionally, the trip to the airport was one-way. (Tr. p. 14).

24. No evidence was presented concerning whether the taxpayer was subjected to taxation by any other state.

CONCLUSIONS OF LAW:

The Department prepared corrected returns (admitted into evidence as Department's Ex. No. 1) for Use Tax liability pursuant to section 4 of the Retailers' Occupation Tax (hereinafter ROT) Act (35 ILCS 120/4). Said section is incorporated into the Use Tax Act via section 12 thereof (35 ILCS 105/12). Section 4 of the ROT Act provides in pertinent part as follows:

As soon as practicable after any return is filed, the Department shall examine such return and shall, if necessary, correct such return according to its best judgment and information, which return so corrected by the Department shall be prima facie correct and shall be prima facie evidence of the correctness of the amount of tax due, as shown therein.

Proof of such correction by the Department may be made at any hearing before the Department or in any legal proceeding by a reproduced copy ... in the name of the Department under the certificate of the Director of Revenue. ... Such certified reproduced copy ... shall without further proof, be admitted into evidence before the Department or in any legal proceeding and shall be prima facie proof of the correctness of the amount of tax due, as shown therein.

In the case at bar, the taxpayer is challenging the assessment by the Department of Use Tax, penalty and interest on the purchase of 25 buses. The taxpayer asserts that the purchases are exempt from Use Tax based upon the "rolling stock exemption" as set forth in sections 3-55 and 3-60 of the Use Tax Act as follows:

Sec. 3-55. Multistate exemption. To prevent actual or likely multistate taxation, the tax imposed by this Act does not apply to the use of tangible personal property in this state under the following circumstances:

(b) The Use, in this State, of tangible personal property by an interstate carrier for hire as rolling stock moving in interstate commerce... . (35 **ILCS** 105/3-55).

Sec. 3-60. Rolling stock exemption. The rolling stock exemption applies to rolling stock used by an interstate carrier for hire, even just between points in Illinois, if the rolling stock transports, for hire, persons whose journeys or property whose shipments originate or terminate outside Illinois. (35 **ILCS** 105/3-60).

In order to qualify for the rolling stock exemption, the claimant must fulfill three distinct requirements. First, to be considered an interstate carrier for hire, the taxpayer must either possess an Interstate Commerce Commission Certificate of Authority, an Illinois Commerce Commission Certificate of Authority, or be a carrier recognized by the Illinois Commerce Commission. (See, 86 Ill. Admin. Code ch. I, Sec. 130.340). In the instant case, the parties stipulated that the taxpayer possesses a Certificate of Authority issued by the Interstate Commerce Commission on June 10, 1988. (Stip. par. 3, Ex. No. 1).

Secondly, the "interstate carriers" must be "for-hire" when not providing school transportation services. As detailed in the administrative rules, "[t]he term "rolling stock" includes the transportation vehicles of any kind of interstate transportation company for hire (... bus line, ...)", but the exemption does not contemplate vehicles:

used by a person to transport its officers, employees, customers or others not for hire (even if they cross State lines) or to transport property which such person owns or is selling and delivering to customers (even if such transportation crosses State lines). 86 Ill. Admin. Code ch. I, Sec. 130.340(b).

TAXPAYER advertises its charter services in the Yellow Pages, and bases its charges for services upon tariffs filed with the ICC. There is no assertion by the Department that TAXPAYER transports persons or property not for hire, nor that TAXPAYER is delivering property it owns, or is selling property and delivering it to customers.

As the first and second requirements have been satisfied, the taxpayer must now prove by documentary evidence that it transports persons or property for hire *moving in interstate commerce*. In the case of First National Leasing & Financial Corporation v. Zagel, 80 Ill.App.3d 358 (4th Dist. 1980), the court opined that oral testimony concerning the taxpayer's interstate activities was insufficient to prove its claim of entitlement to the rolling stock exemption. In the case herein, the taxpayer presented documentary evidence in the nature of invoices or "trip tickets" in support of its position that it moved persons for hire in interstate commerce during the audit period.

The question arises then, as to how much interstate movement is necessary for a taxpayer to be entitled to the exemption. The regulations pertaining to the statutes at issue do not define interstate commerce, but do shed some light on the issue. 86 Ill. Admin. Code ch. I, Sec. 130.340 provides in relevant part as follows:

(c) The rolling stock exemption cannot be claimed by a purely intrastate carrier for hire as to any tangible personal property which it purchases because it does not meet the statutory tests of being an interstate carrier for hire.

(d) The exemption applies to vehicles used by an interstate carrier for hire, even just between points in Illinois, in transporting, for hire, persons whose journeys or property whose shipments, originate or terminate outside Illinois on other carriers. The exemption cannot be claimed for an interstate carrier's use of vehicles solely between points in Illinois where

the journeys of the passengers or the shipments of property neither originate nor terminate outside Illinois.

After several readuits of documents provided by the taxpayer, the Re-Audit and Subsequent Report prepared by the revenue auditor determined that the 25 buses in question traveled 5.01 percent of their total mileage in a four year period in interstate trips, that the buses made a total of 389 interstate trips and that on average each bus made 15.56 interstate trips from August 22, 1990 through June 30, 1993. (Stip. par. 12; Ex. No. 4).

At hearing, the taxpayer presented oral testimony to the effect that a number of additional trips should have been considered interstate, but were incorrectly denied by the auditor. The taxpayer's witness testified that due to driver error in recording mileage, and/or tachometer/odometer variations, it appears that certain trips could not have been intrastate.

However, the taxpayer's explanation for the variances was admittedly based upon conjecture, and this supposition was never conveyed to the auditor. Therefore, it is my determination that these are in fact taxable trips. A mere offering of hypothetical situations not identified with taxpayer's records is insufficient to defeat the presumption of prima facie correctness. (Vitale v. Department of Revenue, 118 Ill.App.3d 210 (3rd Dist. 1983)). Simply questioning the correctness of the Department's determination or denying its accuracy does not shift the burden back to the Department. (Quincy Trading Post, Inc. v. Department of Revenue, 12 Ill.App.3d 725 (1973)). However, assuming *arguendo* that those particular trips were interstate in nature, the overwhelming majority of taxpayer's bus trips were admittedly intrastate school transportation services.

There is no law in Illinois, whether it be case, statutory or regulatory, that sets forth a threshold of interstate movement which must be met before the rolling stock exemption can be invoked. Section 3-55 of the Use Tax Act does specifically provide, however, that the purpose of the exemption set forth therein is to prevent actual or likely multistate taxation of tangible personal property.

The taxpayer cites the case of Burlington Northern, Inc. v. Department of Revenue, 32 Ill.App.3d 166 (1st Dist. 1975), in support of its position that the rolling stock exemption is to be liberally construed in order to avoid placing any possible burden on interstate commerce. In Burlington Northern, the court was concerned with whether the imposition of state Use Tax upon the purchase of various transportation vehicles would unduly burden interstate commerce. The court could not find any legislative history or intent regarding the enactment of the rolling stock exemption, and therefore utilized general principles of statutory construction in rejecting the "original intent and primary purpose" standard employed by the Department in determining whether the rolling stock exemption was applicable to the vehicles at issue. The court found that the application of this standard may make it administratively easier for the Department to decide whether the exemption applies, but it has no basis in statute or regulation, nor was it apparently within the contemplation of the legislature. The court therefore found that Burlington Northern's physical movement across state lines 13 percent of the time, combined with the interstate movement accorded to said taxpayer as a carrier of interstate traffic, was sufficient to allow various transportation vehicles to qualify for the "rolling stock" exemption.

TAXPAYER also cites the case of Time, Inc. v. Department of Revenue, 11 Ill.App.3d 282 (1st Dist. 1973), in validation of its position. In Time, Inc., the court concurred with the position of Time that a taxpayer need not prove that multistate taxation will occur if it is not granted an exemption set forth in section 3-55 of the Use Tax Act (formerly section 439.3). Rather, the court determined that the sole requisite is for the taxpayer to prove that it satisfies the criterion as set forth in the statute, and therefore, qualifies for the exemption.

I find Time, Inc., to recite nothing more than what is already settled case law in Illinois. It is a basic tenet that the taxpayer carries the burden of proof when claiming an entitlement to exemption. (MacMurray College v. Wright,

38 Ill.2d 272 (1967)). Time, Inc., simply clarifies that the prefatory phrase, "[t]o prevent actual or likely multistate taxation ..." is a comment on the intent behind granting the exemption.

The Burlington court seems to ignore this preamble to the exemptions set forth in section 3-55 of the Act. This attitude appears to stem from the court's determination that the Illinois legislature intended to exempt rolling stock moving in interstate commerce regardless of the potentiality of multiple taxation. Not only do I disagree with this conclusion, it is my determination that the Burlington Northern case is not an authoritative reference in determining the instant issue.

The Burlington case is factually distinguishable from the instant case. The court in Burlington determined that the purchases of various types of equipment by the railroad company were excepted from Use Tax pursuant to the rolling stock exemption due to the intertwining of taxpayer's intrastate and interstate business. In finding passenger cars exempt, the court held that when considering Burlington's 13 percent of actual physical movement across state lines, combined with the interstate movement "conferred on" the railroad by reason of its transportation of interstate traffic consisting of mail and express packages, it can be concluded that Burlington's "interstate use and involvement is ... intertwined with its intrastate use...". (32 Ill.App.3d 166, 176). The same reasoning was applied when finding switching engines to be exempt. That is, the railroad company's interstate use and involvement of the equipment was so intertwined with its intrastate use that to discontinue its intrastate business would in great measure negatively affect its interstate business.

The business of Burlington Northern consists in great measure of the interstate movement of people and goods. On the other hand, the nature of TAXPAYER's business is the intrastate transportation of children on a contract basis for school districts in Illinois. TAXPAYER has committed its resources to doing business within Illinois; its transportation of people to O'Hare or across

state lines on a charter basis seems tantamount to an afterthought in that it is done on such a relatively rare and incidental basis.

In First National Leasing & Financial Corporation, *supra*, the court denied the taxpayer the rolling stock exemption due to the fact that it lacked documentary evidence to indicate the amount of interstate commerce in which it engaged. In a concurring opinion, Justice Green opined that the oral evidence elicited at the administrative hearing indicated that the equipment at issue crossed on an "infrequent and irregular basis". There was no bonafide risk of multistate taxation, and therefore, no commerce clause requisite for the apportionment of Use Tax to use in Illinois.

In the case at bar, the documentary and testimonial evidence establishes that the 25 buses at issue traveled approximately 5.01 percent of their miles during an entire four year period in interstate trips, that the buses made a total of 389 interstate trips and that on the average, each bus made 15.56 interstate trips during the four year period. The 5 percent of trips that were conceded to be interstate travel constituted crossing state lines or going to O'Hare International Airport.¹ Ninety-five percent of the total number of trips consisted of school transportation services.² There is no evidence that the interstate trips were at all conducted on a fixed schedule, and it is clear that they occurred very infrequently. In fact, Exhibit 3 to the Stipulation evidences that a number of the buses at issue made zero out of state trips during one or more of the years at issue.

¹. It is to be noted that the parties labeled as "interstate" 15.56 trips per bus for the period of August 22, 1990 through June 30, 1993, or in other words, approximately 4 trips per bus per year audited. For purposes of this hearing, the Department concedes these four trips per calendar year as interstate. I note, for example, that Bus No. XXXXX was hired to transport a group from XXXXX in Northbrook, Illinois to XXXXX in Waterford, Wisconsin at 9:00 a.m. on June 6, 1991 and return the same group the same day at 2:30 p.m. Also, Bus No. XXXXX was hired by Hawthorn School District No. 73 in Vernon Hills, Illinois to transport a group to the Children's Museum in Milwaukee, Wisconsin and return the same day at 2:30 p.m. (Tr. pp. 20-24; Taxpayer's Grp. Ex. No. 1). These types of same day trips carrying what seem to be the same passengers on the same bus with the same driver appear to *begin and end* in Illinois.

². This finding is based upon cross-examination testimony elicited from taxpayer's general manager. (See: Tr. p. 15).

Admittedly, the pertinent statute and regulations set forth no standard or test to determine what constitutes interstate commerce. However, it appears from First National, *supra*, that there is a necessity for some guideline in determining whether the exemption should be granted. Interstate travel on an "infrequent and irregular basis" has been determined to be insufficient to entitle an interstate carrier for hire to the rolling stock exemption. There must be more.

There is no suggestion that any other state was in a position to impose its own Use Tax on the rolling stock, nor is there any likelihood of multistate taxation due to the very limited utilization of the buses in other states. Given the facts of the case, it is highly improbable that another state could constitutionally impose a tax on the buses. Due to the lack of any "substantial nexus" between the activity to be taxed and another state, any attempt by another state to tax would result in Commerce Clause violations. (See: Complete Auto Transit, Inc. v. Brady, 430 U.S. 274 (1977)).

As noted previously, when granting exemptions from tax, the burden is on the taxpayer to prove clearly and conclusively its entitlement thereto. Statutes which exempt property or entities from taxation must be strictly construed in favor of taxation and against exemption. (Wyndemere Retirement Community v. Department of Revenue, 274 Ill.App.3d 455 (2nd Dist. 1995)). In the case at bar, TAXPAYER has failed to carry its burden of proof. It is, therefore, my determination that the taxpayer is not entitled to the rolling stock exemption, and that Use Tax was properly assessed on the bus purchases.

RECOMMENDATION:

It is my recommendation that NTL No. XXXXX be affirmed in its entirety.

Administrative Law Judge